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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 988

PRE-FAB TRANSIT CO.,
Appellant

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION *et al.*,
Appellees

On Appeal from the United States District Court for the Southern District of Illinois, Southern Division

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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Respondents' claims that this appeal presents no substantial questions warranting review are founded on error. This appeal does not, as respondents would have it, involve the interpretation of a motor carrier certificate. Rather, this appeal presents a novel and important question of administrative law—whether the Commission may effectively deny a motor carrier the opportunity to be heard on the interpretation and modification of its certificate by misleading it to believe that the opportunity to be heard will be accorded, and the interpretation and modification made, in another proceeding.

Complaints of the type which the Commission had before it in March 1966—that by a competitor of Pre-Fab, alleging that Pre-Fab had unlawfully transported one load of ornamental iron columns from Kentucky to West Virginia—are routine and even commonplace in the highly competitive motor carrier industry. Pre-Fab had no reason to suppose that this complaint proceeding would go beyond determining the propriety of its hauling ornamental iron columns. Any initial doubts as to the scope of the case would have been immediately dispelled. The Commission took two steps in sharp derogation of its significance, making it irrational to suppose it could serve as a vehicle for a sweeping interpretation or modification of Pre-Fab's certificate.

1. Most importantly, the Commission, one month after the competitor's complaint, launched on its own motion a full-scale investigation of Pre-Fab's operations whose scope and seriousness is apparent from its title—*Pre-Fab Transit Co.—Investigation and Revocation of Certificates* (Docket No. MC-C-5106). Subsequently, the Commission formally advised Pre-Fab that the investigation would involve over 100 movements of more than 50 types of commodities. Manifestly, this proceeding was specifically conceived and instituted to serve as a proper basis for a comprehensive inquiry into and interpretation of Pre-Fab's authority.

2. The Commission designated the complaint case for modified procedure. This is a procedure whose basic propriety in appropriate proceedings we do not challenge. But, since it avoids an oral hearing and reaches determinations on the basis of a paper record only, a case utilizing this procedure is a dubious vehicle for reaching fundamental determinations and is not appropriate where a respondent is known to desire an oral hearing and can compel it. Obviously, designating the complaint case for modified procedure, when taken together with the Commission's institution of a comprehensive investi-

gatory proceeding, was tantamount to advising Pre-Fab that the complaint case would involve only the propriety of its hauling ornamental iron columns and that the investigatory proceeding was the overriding one in which Pre-Fab would fully be heard and which would doubtless culminate in a full-fledged interpretation of its certificate.

We made clear in our jurisdictional statement, and respondents do not deny, what occurred. Through the sole fault of the Commission, a scheduled hearing in the investigatory proceeding aborted. The Commission rescheduled, postponed, rescheduled and then eliminated the hearing by cancelling the proceeding. It did so because it had taken the complaint case, pigeonholed for some two years and almost forgotten, blown the dust off its two or three substantive pages of affidavits, and issued a sweeping interpretation of both Part A and Part B of Pre-Fab's certificate. The hearing dangled before Pre-Fab in the general investigatory proceeding was thus denied, and Pre-Fab is now told that if it wanted an oral hearing, it should have so requested in the complaint case.

AS TO PART A

The key word in Part A of Pre-Fab's certificate, which has never been construed, is "prefabricated." It was clear to Pre-Fab, through both formal and informal contacts with the Commission, that the Commission's understanding of what constitutes a "prefabricated building" differed markedly from Pre-Fab's and, as Pre-Fab sought to demonstrate, from the understanding of those engaged in the rapidly evolving art of prefabrication. Pre-Fab's self-interest sharply dictated that it use the first opportunity to present the Commission a full exposition of "prefabrication," as this building art is now understood and employed.

That opportunity was offered Pre-Fab by the Commission's institution of its wide-ranging investigatory proceeding. Pre-Fab reacted accordingly. As the affidavit of its general counsel advised the District Court, Pre-Fab "engaged in a massive effort to obtain for presentation to the Commission in [the investigatory proceeding] a complete and exhaustive exposition of information and expert opinion which would inform the Commission of the state of the art of prefabrication and enable it properly to interpret Pre-Fab's certificates." * The Commission was, both formally and informally, aware of Pre-Fab's intentions, having been formally made so aware when Pre-Fab appeared at the aborted hearing, ready to present the first of its series of experts.

The Motions to Affirm simply do not come to grips with these truths. Instead, the Commission now urges that "appellant had not requested either an oral hearing [in the complaint case] or a consolidation of the proceeding with any other pending case" (Motion to Affirm, p. 4). But Pre-Fab did not request an oral hearing in the complaint case, or its consolidation with any other proceeding, because the Commission's overall handling of the several proceedings reasonably led Pre-Fab to believe that the investigatory proceeding was the intended vehicle for any interpretation of Part A of Pre-Fab's authority, and that it, not the minor complaint case, was the appropriate proceeding wherein Pre-Fab would be fully heard. The Commission has still failed to provide the answer to the question which District Judge Morgan put at the argument below:

> "What I can't understand at all is if the Commission felt it could properly and intended to make this broad decision that it has done now in the Miami case, why

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* The affidavit further informed the District Court that Pre-Fab intended to present at least eight experts from a list of sixteen whose names and qualifications were provided, and that Pre-Fab spent over $120,000 in preparation for the investigatory proceeding.

did it file 5106, the investigation case, and set it for hearing and notice it for hearing, unless it was to mislead somebody, why, why did it do it?"

The Commission argues (Motion to Affirm, p. 5) that denial of a hearing was not consequential since Pre-Fab could not have established at a hearing that its transportation of ornamental iron columns was justified under Part A of its certificate. This conclusion is based on an alleged Pre-Fab concession (Motion to Affirm, pp. 3, 5) that Part A does not authorize an independent shipment of ornamental iron columns. Even had Pre-Fab so conceded, which it did not,* such a concession would in no way justify what the Commission did here. Pre-Fab complains because the Commission undertook a sweeping construction of what constitutes "prefabrication" without giving Pre-Fab a hearing and an opportunity to present the Commission with expert testimony as to the present state of the art. It is not an answer—it is beside the point—for the Commission to argue that Pre-Fab, even if given a hearing, could not have shown that the transportation of ornamental iron columns is authorized by Part A of its certificate.

AS TO PART B

The Motions to Affirm also fail to come to grips with the illegal manner in which the Commission reversed its consistent interpretation of Part B of Pre-Fab's certificate, as evidenced in over 100 Commission decisions rendered over a period of ten years. This is clearly to modify Pre-Fab's authority and, as a modification, required hearing under Section 212 of the Motor Carrier Act (49 U.S.C. § 312). See J.S., p. 14). But the Commission,

* The District Court's attribution of such a concession to Pre-Fab misreads the hearing transcript before it. All Pre-Fab's counsel said was that Pre-Fab might not have thought it worth a law suit had the Commission simply determined that the movement of ornamental iron columns (for which Pre-Fab received revenues of $194.16) was outside the scope of Part A of its certificate.

twice explicitly denying in the general investigatory proceeding that it had any intention to do so, utilized the minor complaint case to modify Part B by overturning the long-accepted interpretation.

The Commission had recognized since 1958 that, as a result of judicial interpretation, Part B conferred authority on Pre-Fab to transport building materials independently of buildings.* Again and again, and in a variety of ways, with only the single exception which the Motion to Affirm points out (*Oyler Motor Transit Co., Inc., Extension—Building Materials*, 94 M.C.C. 638 (1963)), the Commission reaffirmed the authority of Pre-Fab to transport building materials intended for use in buildings. We cited to the District Court 86 cases in which Pre-Fab protested, sometimes successfully and sometimes not, applications by others in which Pre-Fab's standing to oppose depended upon its authority to transport building materials, and in which a Commission examiner, a joint board, a review board and or the Commission explicitly or implicitly recognized that it had such authority. Additionally, in scores of application proceedings instituted by Pre-Fab, in response to inquiries by the public, and in accepting tariffs for trans-

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* In 1957, in *Whitehouse Trucking, Inc.* v. *Pre-Fab Transit Co.*, 71 M.C.C. 155, the Commission had held that Pre-Fab's Part B authority to transport "*Buildings*, complete, knocked down, or in sections, including all component parts, materials, supplies, and fixtures, . . ." authorized transportation of component parts, materials, supplies, and fixtures only if transported "in connection with" a complete building. The District Court for the Southern District of Illinois reversed, concluding that Pre-Fab could transport component parts, materials, supplies, and fixtures "independently of or in connection with" the transportation of buildings. *Pre-Fab Transit Co.* v. *United States*, C.A. No. 2394 (1958). The Commission's contemporary actions clearly recognized the force of the District Court's opinion as authorizing the transportation of building materials intended for use in buildings. For example, it accepted tariffs on general building materials which it had previously suspended on the restrictive view expressed in the *Whitehouse* case.

porting building materials, the Commission confirmed its view that Part B authorized the transportation of building materials intended for use in buildings.

Had there been any lingering doubt as to the proper interpretation of Part B—for example, a doubt deriving from the *Oyler* opinion—two Commission actions in the general investigatory proceeding would have set it to rest. As we pointed out in our Jurisdictional Statement (pp. 8-9), Pre-Fab was concerned that the general investigatory proceeding included inquiry about movements within the scope of Part B as consistently interpreted. It, therefore, petitioned the Commission for clarification and moved the District Court for the Southern District of Illinois to enforce its 1958 judgment. The Commission, in disposing of the clarification petition, explicitly stated that it had no intention of questioning any movement of building materials intended for use in buildings, but only movements of customary building materials actually intended for other uses. As to the judicial proceeding, the Commission procured the entry of a consent order which said *in haec verba* that it did not propose to "relitigate" the 1958 decision and would not challenge the movement of building materials intended for use in buildings.

The District Court's understated comment upon this long and almost invariable record of interpretation was to note that the Commission's current interpretation of Part B "apparently, to some degree, represents a change of mind by the experts" (J.S., p. 18). In an appended footnote, the District Court went on to say that "Pre-Fab had the benefit of any such earlier breadth of interpretation while it existed." This is serious error. Pre-Fab's reasonable belief that it had authority to transport building materials in the ten-state geographical area covered by Part B caused it to limit the scope of many applications.* Had Pre-Fab's authority been modified in

* To illustrate, Pre-Fab's Sub 124 application resulted in authority to transport roofing slabs from a Wisconsin county to 28 states, excluding, in addition to 12 western states, the 10 Part B states to

1958, as it has now been in 1968, applications by Pre-Fab in the intervening years would have been quite different and might have compensated in large measure for what Pre-Fab will, but for this Court, now lose.

The Commission's handling of the complaint and general investigatory proceedings perpetrated on Pre-Fab the same essential type of deception as to Part B as was done in respect of Part A. In the general investigatory proceeding, Pre-Fab appropriately challenged, both before the Commission and in court, the possibility that that proceeding threatened a departure from the long-established interpretation of Part B. In both Commission and judicial proceedings the Commission rejected with emphasis the notion that it contemplated any such departure. It then utilized the no-hearing, one-commodity complaint case to do precisely what it had denied was contemplated in the general investigatory proceeding.

In these circumstances, the Commission's defense that Part B was lawfully modified because Pre-Fab failed to request a hearing (Motion to Affirm, p. 4) is not an adequate one. Pre-Fab did not request an oral hearing in the complaint case because the Commission so handled it in conjunction with the general investigatory proceeding as to mislead Fre-Fab. Notably, the Commission does not argue that Pre-Fab was not entitled on demand to an oral hearing. Implicit in the Commission's argument that Pre-Fab waived its right to a hearing is recognition that Pre-Fab otherwise would have had a statutory right to an oral hearing because its certificate was "reinterpreted" to the point of modification.

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which the bulk of the traffic would normally move. The Commission recognized the inclusion of these 10 states was unnecessary, as authority to transport roofing slabs within them was already conferred by Part B of Pre-Fab's certificate. Similarly, Pre-Fab's Sub 135 application authorized the transportation of wallboard, hardboard, and doors from an Ohio county to nearly all the states east of the Rocky Mountains, but again excluding the vital 10-state Part B area on the theory that Part B already conferred authority.

Apart from the statutory legal requirement for a hearing before the certificate may be modified, a hearing is urgently needed in the interests of clarification. What Part B authorizes Pre-Fab to transport is now hopelessly muddled. The *Oyler* thesis that Pre-Fab was authorized to transport only materials intended for use in buildings themselves physically capable of transportation has obvious intrinsic and linguistic difficulties and was apparently deemed insupportable by the Commission. The present complaint case, in asserting that Pre-Fab could carry only such materials as "have the character of buildings" appears meaningless. In the District Court Commission counsel did not support that formula of words but asserted Pre-Fab might transport materials intended for use in "transportable" buildings. Then, by defining a "transportable building" as not excluding a Hilton hotel, he left us possibly without an issue as to Part B but certainly bewildered. The Motion to Affirm (p. 3) now asserts that Pre-Fab may transport only commodities intended for use in a "prefabricated house or building." Of all possible interpretations this one is the most certainly wrong. Part B of Pre-Fab's initial certificate authorized the transportation of "prefabricated buildings . . . including . . . materials . . .". Within a year, the Commission struck "prefabricated" upon an explicit finding that the authority should not be so confined.

CONCLUSION

The question which Pre-Fab's appeal presents—not those which respondents erroneously say it presents—is manifestly substantial and warrants plenary consideration. Probable jurisdiction should be noted.

Respectfully submitted,

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